No. 77-901

In the Supreme Court of the United States

OCTOBER TERM, 1977

PAUL GORDON FRAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 564 F. 2d 821.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1977. A petition for rehearing was denied on December 2, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on December 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the exclusion of intercepted telephone conversations proffered by petitioner required reversal of his conspiracy conviction.

2. Whether government agents, in intercepting wire communications under court orders, complied with the minimization requirement of 18 U.S.C. 2518(5), and whether petitioner has standing to assert the agents' noncompliance.

3. Whether it was error for the trial judge to refuse to inquire of the jurors if they had read six newspaper articles which appeared during petitioner's two month trial.

4. Whether the district court erred in striking from the conspiracy count one of the three objects of the alleged conspiracy.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to distribute lysersic acid diethylamide (LSD) and to possess that drug with intent to distribute it, in violation of 21 U.S.C. 846; of the use of the telephone in furtherance of that conspiracy, in violation of 21 U.S.C. 843(b); and of three counts of possession with intent to distribute and distribution of LSD, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to a total of 19 years' imprisonment and a lifetime special parole term. This included a sentence of five years' imprisonment on the conspiracy count. On appeal, the court of appeals affirmed the conviction on the conspiracy count and reversed the convictions on the substantive counts (Pet. App. A).

1. The evidence showed that Clarence Batchelder was a dealer in various illicit drugs, that his supplier was Vladimir Petroff, and that petitioner, a chemist, was a partner of Petroff.

More particularly, the evidence showed that in September 1972, Timothy Martin, a state undercover agent, began negotiating with Batchelder for the purchase of LSD (36 Tr. 62)[1] and that on November 30, 1972, and again on January 14, 1973, he purchased some LSD from Batchelder for $3,000 (36 Tr. 64-65, 75). Martin then negotiated for larger quantities of LSD and arranged to meet Batchelder for such a transaction on January 23, 1973, at an airfield (36 Tr. 94). Batchelder, however, refused to allow Martin to meet his supplier (36 Tr. 87-93). Shortly before this transaction occurred, Batchelder met with Petroff. Batchelder then drove to the airfield. There, after Martin gave Batchelder a briefcase full of cash, federal agents arrested Batchelder (36 Tr. 94-96). Petroff, who was waiting near the airfield, returned to his residence, where he was arrested and a small notebook containing petitioner's address in code was seized incident to the arrest (55 Tr. 2542; GX 92, 115). Later that day government agents executed a search warrant at Petroff's residence and seized a document describing a two-step procedure for the manufacture of LSD from ergotamine tartrate[2] and a list of European chemical supply houses dealing in the substance. The list was written in petitioner's handwriting (41 Tr. 778; GX 98, 99, 104). The

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[1]The abbreviation "Tr." refers to the transcript; the volume number precedes it and the page number follows. "GX" refers to government exhibits, "Ct. X" to court exhibits, and the prefix "M" refers to an exhibit designated during the motions.

[2]Ergotamine tartrate is a precursor of LSD and has little legitimate use (44 Tr. 1245-1248). Although petitioner does not raise the matter, we note that in the government's response to the petition for rehearing in the court below, the government mistakenly stated that the document describing the procedure for manufacturing LSD was in petitioner's handwriting (Gov. Br. in Response to Pet. for Reh., p. 16). That mistake, however, was not made in the government's initial

agents also seized 231 grams of LSD and approximately $20,000 in cash (including some of the money previously paid to Batchelder for LSD), as well as Petroff's passport application, which listed petitioner's telephone number as his own (GX 170; Pet. App. 14).

The government also introduced evidence derived from two court authorized telephone interceptions between January 11 and January 23, 1973, on Batchelder's telephone and a telephone subscribed to by Rose Cota, a person with whom Petroff resided. The evidence included three calls intercepted over the Cota telephone to which petitioner was a party. Petitioner was not a party to any of the calls intercepted over Batchelder's telephone.

During the period from January 11 to January 23, there were telephone conversations and other meetings between Batchelder and Petroff which showed the latter to be Batchelder's supplier (*e.g.*, 39 Tr. 579; GX 20B). Petroff also had meetings and telephone conversations, using coded words, with petitioner and his co-defendant Abascal. In particular, in a telephone conversation on January 14, Petroff asked petitioner if he remembered "Old Charlie" and said Old Charlie had an "acre" for sale, seeking, in coded language, petitioner's approval of an LSD transaction (43 Tr. 1124-1125; GX 21B). Following the call, Petroff flew from San Diego to meet with Abascal at a restaurant in Los Angeles and, after leaving the restaurant, took a taxicab to petitioner's house, where he remained for two hours (43 Tr. 1196-1198). In

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brief and is not reflected in either the opinion below or the order denying rehearing. Rather, the opinion below relies, *inter alia*, on the correct fact that the list of European supply houses dealing in ergotamine tartrate was in petitioner's handwriting (Pet. App. 14).

addition, the government intercepted two calls on January 17, including one in which petitioner called Petroff to voice his assent to a proposed transaction (43 Tr. 1125-1129; GX 24B).

On January 23, when petitioner was arrested, a notebook was taken from him that contained the telephone number of one Green, a supplier of ergotamine tartrate (55 Tr. 2544; GX 133). Petitioner's notebook also contained the number of Shelly Federgreen, a friend of Abascal. The Federgreen number coincided with a telephone number found in Petroff's notebook (55 Tr. 2542; GX 92).

ARGUMENT

1. Petitioner contends (Pet. 5-10) that recorded intercepted conversations between Petroff and other parties not defendants in this case should have been admitted into evidence "for the purpose of explaining and putting into context the conversations which the government played" (Pet. 6), particularly the January 14 conversation between Petroff and petitioner. His theory is that such conversations would have shown that words used on January 14 such as "acre" and "prime property for sale" were not simply coded words but related to genuine real estate transactions (55 Tr. 2602-2614). The trial court judge rejected the proffered recordings on the ground that they were inadmissible hearsay (55 Tr. 2608, 2612-2614). On appeal, the court of appeals held that this ruling constituted reversible error with respect to the substantive counts charging petitioner with possession of specifically identified amounts of LSD and with respect to the substantive count charging petitioner with unlawful use of a telephone (Pet. App. 11-13). The court held,

however, that the ruling was not reversible error with respect to the conspiracy charge, since that charge was abundantly established by other evidence that would not have been undermined by petitioner's establishing the innocence of the January 14 conversation (Pet App. 14). That holding was correct.

The government's theory on the possession counts was that petitioner had constructive possession of the LSD sold by Batchelder to Martin on January 14 and of the LSD found in Petroff's house on January 23. The court of appeals found that the January 14 conversation between petitioner and Petroff was important evidence to substantiate that theory and also to prove the substantive count charging petitioner with unlawful use of a telephone, and accordingly held that the district court's error in excluding petitioner's proffer of evidence to show that that conversation related not to drugs but to real estate was not harmless (Pet. App. 13). We do not challenge that holding.

The January 14 conversation, however, was not significant evidence with respect to the conspiracy count. As the court of appeals noted (Pet. App. 14), the conspiracy was abundantly established by other evidence, including coded notebooks linking petitioner with Petroff and Abascal and a list in petitioner's handwriting of European chemical companies manufacturing a precusor of LSD. Even if petitioner had been able to introduce evidence tending to show that the January 14 conversation related to a legitimate real estate transaction, it would not have affected the jury's conclusion with respect to his participation in the conspiracy. Thus the court below correctly concluded that there was "no way the

excluded evidence could have helped petitioner rebut the conspiracy case" (Pet. App. 14), and this conclusion does not warrant review by this Court.[4]

2. Petitioner, who was overheard as a participant in only four conversations over the Cota telephone, three of which were admitted into evidence, contends (Pet. 10-13) that the agents violated the minimization requirement of 18 U.S.C. 2518(5) during the 12 days that they intercepted conversations over both the Cota and Batchelder telephones. This contention is contrary to the evidence adduced at an extensive suppression hearing in the district court.

The evidence at the hearing showed that the interception on each telephone was conducted by agents simultaneously using three tape recorders. Two of the recorders were reel-to-reel recorders each operated by an agent with headphones who was listening to the intercepted conversations. The third recorder was a small cassette recorder operated by an agent who, at least for the first few days of the intercept, had no headphones. The tapes recorded by the reel-to-reel recorders were intended for the use of the court and the United States Attorney. Whenever the agents operating those recorders decided to terminate an interception, they shut off the telephone connection and their tape recorder. The cassette tape recorder was for the agents' use in preparing

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[4]There is no basis for petitioner's claim (Pet. 7) that the exclusion of conversations between Petroff and others "erroneously deprived [petitioner] of an opportunity to present a defense * * *." Petitioner was not denied an opportunity to testify to his own understanding of the conversation (in contrast with *United States* v. *Paquet*, 484 F. 2d 208 (C.A. 5), on which petitioner relies) or to present evidence from the participants in the conversations or other evidence showing that he and Petroff were talking about real estate rather than drugs.

summaries of the interceptions at the end of each day, and it was typically reused each succeeding day, thus erasing what had been recorded previously.[5]

The evidence also showed that the agents were instructed to terminate interception and recordation of all conversations outside the scope of the intercept order (8 Tr. 1012-1015; 17 Tr. 2246), that they made a good faith attempt to comply with those instructions (10 Tr. 1358), and that they in fact terminated interception and recordation of 24 of the 123 calls made over the Cota telephone during the period of the interception (see GX 69 for ID).

The record refutes petitioner's assertion (Pet. 11) that the tapes from the cassette recorders "ran continuously and were never minimized." As petitioner admits (Pet. 11, n. 4) the agents clearly and consistently testified that they intended to shut off the cassette recorder whenever the reel-to-reel recorders were shut off, and that they did so for the most part. The record discloses only two instances in connection with the Cota interceptions, both of which occurred on the first day of the interception, in which the cassette recorder was inadvertently left on after the reel-to-reel recordings were terminated. In one case the cassette recorded the entire conversation, and in the other it was shut off before the end of the conversation but after

[5]See, *e.g.*, 9 Tr. 1228; 10 Tr. 1274-1276, 1293, 1427-1430; 12 Tr. 1514-1515; 14 Tr. 1828-1837, 1856-1858, 1887-1888; 18 Tr. 2281, 2330, 2441-2442, 2448, 2452). Two cassettes were apparently not reused, but placed in the automobile trunk of the supervising agent. The record does not disclose why those tapes were not reused, but it does establish that the agents involved were unaware that the cassettes contained any conversations not recorded on the other recorders. See discussion *infra*, p. 9, n. 6.

reel-to-reel recorders were shut off (22 Tr. 2811-2814; 24 Tr. 3218-3222; M Ct. X 25).[6] In short, the record establishes substantial non-interception and non-recordation of calls on all three machines pursuant to the minimization requirements of the intercept orders.

The court of appeals rejected petitioner's minimization claims on the assumption that the agents had recorded all conversations in their entirety. Relying in part on *United States* v. *Scott*, 516 F. 2d 751 (C.A.D.C.), now before this Court in *Scott* v. *United States*, No. 76-6767, certiorari granted, October 11, 1977, the court below concluded that "the agents reasonably could have recorded all the monitored calls during the twelve-day life of the wiretaps" (Pet. App. 6). In reaching this conclusion, it noted that "the life of the wiretap was very brief," "the investigation involved a large scale drug ring in which the existence but not the identity of co-conspirators was known," and that "the conversing conspirators frequently

[6]The record also discloses four instances in which the cassette recorder used in the Batchelder intercept inadvertently recorded more than the reel-to-reel machines, although none of the agents manning that intercept were aware of the fact (17 Tr. 2157-2158, 2184-2185; 18 Tr. 2300-2301, 2321-2325, 2436-2453; 19 Tr. 2568-2569, 2571-2572, 2593-2599).

Petitioner's claim that the cassette recorders intercepted every conversation is based primarily on the testimony of a statistician called by the defense who claimed to perceive variances between the substance of agents' notes of their interceptions and the transcripts prepared from the reel-to-reel recorders, and who concluded that the variances were not the result of chance (22 Tr. 2827-2860; 23 Tr. 2986-2996). The statistician's testimony reflects that most of the variances are the result of differences between his and the agents' interpretation of the conversations intercepted. His conclusion, moreover, is contrary to both the agent's direct testimony on the matter and the fact that one of the two cassette recordings of conversations on the Cota telephone was discontinued before the end of the conversation.

discussed non-narcotic-related matters at the beginning of conversations, and often reverted to jargon and code words" (Pet. App. 7).

That ruling was correct. Even on the court's assumption, contrary to the record, that all calls were intercepted, the circumstances identified by the court below indicate that total interception would have been reasonable. Other decisions have identified the same circumstances as supporting the reasonableness of wire interceptions.[7] Petitioner has not identified any intercepted conversation that he claims could not reasonably have been intercepted, and relies only on the assertion that all calls were intercepted (Pet. 11).

Despite the reliance of the court of appeals on the rationale of the District of Columbia Circuit in *Scott*, the correctness of which is presently before this Court in that case, we believe that it would serve no useful purpose for this Court to defer decision on this petition pending its decision in *Scott*. The question whether an interception has complied with minimization requirements of the judicial order necessarily depends on the facts of each case. While this case and *Scott* share certain features (*e.g.*, an investigation of a large scale drug ring and use of coded language by the conspirators), it differs in other respects (*e.g.*, the length of the intercept). The most significant difference is the fact that here the agents terminated the interceptions of a significant number of calls. Unless the Court accepts petitioner's factual allegations to the contrary, which are rebutted by the

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[7]See, *e.g.*, *United States* v. *Chavez*, 533 F. 2d 491 (C.A. 9), certiorari denied, 426 U.S. 911; *United States* v. *Turner*, 528 F. 2d 143, 157 (C.A. 9); *United States* v. *James*, 494 F. 2d 1007 (C.A.D.C.), certiorari denied *sub nom. Tantillo* v. *United States*, 419 U.S. 1020.

record, there is no factual basis here for the kind of claim made by petitioners in *Scott*—namely, that the interception of all calls demonstrates the agents' bad faith or improper subjective intent, which, the *Scott* petitioners claim, taints interceptions that are objectively reasonable.

This case also differs from *Scott* with respect to the standing issues.[8] Petitioner's minimization claim appears to rely substantially on the interception of conversations over the Batchelder telephone (Pet. 10). Petitioner was never overheard on that telephone and had no connection with that telephone. With respect to the interception of conversations over that telephone, petitioner is clearly not an "aggrieved person" under 18 U.S.C. 2510(11) and 2518(10)(a). See, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165, 175 n. 9, 176-180; *United States* v. *Fury*, 554 F. 2d 522, 525-526 (C.A. 2). *Scott*, in contrast, involves the interceptions of communications over only one telephone, on which all of the petitioners were overheard.[9]

3. The court of appeals correctly rejected petitioner's further contention (Pet. 13-15) that the district court erred in failing to inquire of the jurors whether they had read several newspaper accounts concerning the trial.

In citing authorities for the proposition that a district court must ascertain whether jurors have read or heard prejudicial publicity to which they may have been exposed

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[8]Having found no violation of the minimization requirements, the court below did not reach any standing question (Pet. App. 6).

[9]Petitioner's standing to assert a failure to minimize the Cota interception presents the same standing issue presented in *Scott*. We contend that petitioner, like Scott, has no standing to assert as a basis for suppressing his conversations—which were themselves properly intercepted—the failure to minimize the interception of other conversations to which he was not a party.

(Pet. 13-14), petitioner overlooks the basis of the rulings of the district court and the court of appeals, which was that the newspaper articles in question were not prejudicial (Pet. App. 20). As the court of appeals noted (Pet. App. 20-21) the six articles in question

> were, for the most part, short, routine, factual descriptions of court proceedings, appearing in the middle and back pages of the newspapers. * * * Only the claim [made in two of the six articles] that this was "the largest LSD seizure ever made in this country" * * * was arguably incorrect and arguably prejudicial. This does not qualify as material which is either "spectacular or inflammatory." *Gawne* v. *United States*, 409 F. 2d 1399, 1401 (9th Cir. 1969), cert. denied, 397 U.S. 943 * * *.

The court's conclusion that the district court did not abuse its discretion in declining to make the inquiry (see *United States* v. *Pomponio*, 517 F. 2d 460, 463 (C.A. 4); *United States* v. *Polizzi*, 500 F. 2d 856, 880-881 (C.A. 9)) was clearly correct in view of the nature of the articles and the fact that the jury had first-hand information of the amount of the LSD involved in this case and was therefore unlikely to have been influenced in deciding the guilt or innocence of any defendant by this characterization in the newspaper. Indeed, the jury acquitted two of the defendants. It was sufficient that the trial court, in its final instruction, told the jury to disregard anything other than the evidence they have heard in court, and specifically referred to the fact that there may have been some articles in the press relating to the trial (59 Tr. 3097, 3100-3101).[10]

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[10]In addition, the latest of the newspaper articles was published four weeks prior to the time that the jury was called upon to render its verdict. By then, whatever arguable effect that publicity could have had upon the jury was blunted if not completely dissipated. See *United States* v. *Persico*, 425 F. 2d 1375, 1380 (C.A. 2), certiorari denied, 400 US. 869.

4. Petitioner errs in contending (Pet. 15-17) that the district court impermissibly amended the indictment. The conspiracy count alleged that the defendants "did knowingly and intentionally combine, conspire and agree together and with each other * * * to knowingly and intentionally import, distribute and possess with intent to distribute LSD, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841, 846, 952, 960, and 963." At the close of the government's case the defendants moved for acquittal of the conspiracy charge on the ground of failure to prove importation. The district court responded by striking the word "import" from the indictment (Pet. App. 16-17).

Petitioner does not dispute the well-settled principle that the government may charge in the conjunctive that which statutes denounce disjunctively, and that evidence supporting any one of the charges will support a guilty verdict. See, *e.g.*, *United States* v. *Hobson*, 519 F. 2d 765 (C.A. 9), certiorari denied, 423 U.S. 931. The court may also charge the jury that the evidence does not support one of the theories of guilt. And, as the court below concluded (Pet. App. 18): "It seems anomalous, however, to allow a trial judge to water down an indictment by instructing the jury to disregard one of its allegations, yet to forbid any physical alteration on the face of the indictment. This elevation of form over substance is wholly inconsistent with modern criminal pleading." Here, the striking of the word "import" did not change

the nature of the offense or broaden its scope; rather, it narrowed the offense charged and facilitated the presentation of a defense.[11]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[11]The cases relied on by petitioner (Pet. 15-17) are not to the contrary. As petitioner recognizes, those cases merely prohibit "any significant amendment" of an indictment. The deletion of allegations which are not necessary elements of the offense does not significantly amend the indictment but merely eliminates surplusage.

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